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### The Continued Rise of the Reproductive Justice Lawyer

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# The Continued Rise of the Reproductive Justice Lawyer

*Leigh Creighton Bond & Monika Taliaferro\**

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## I. INTRODUCTION

*“No one ever talks about reproductive justice in their political platforms but [Stacey Abrams] did running for governor. It speaks to how we need more, not only women of color in office but, folks from the South who are actually from communities who can speak to these issues.”<sup>1</sup>*

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<sup>1</sup> Amanda Michelle Gomez, *Stacey Abrams got the country talking about a 6-week abortion ban in Georgia*, THINK PROGRESS (Mar. 29, 2019, 9:15 AM), <http://thinkprogress.org/how-stacey-abrams-got-more-people-to-care-about-a-6-week-abortion-ban-georgia-a2d03bf913c6/> [<http://perma.cc/TC28-8APZ>].

The 2018 Georgia governor's race presents the latest battle cry for the reproductive justice movement to continue the fight against the disenfranchisement of voters. Voter suppression is a reproductive justice issue.

Before the 2018 Election Day, in 2017, Georgia purged over 500,000 voters from rolls under a "use it or lose it law."<sup>2</sup> And under an exact match system, over 51,000 voters had a pending status and were in jeopardy of not being cleared to vote before Election Day.<sup>3</sup> A month before Election Day, the American Civil Liberties Union of Georgia ("ACLU"), as Plaintiffs' counsel, sought a temporary restraining order to "stop an ongoing constitutional train wreck," citing that "over 500 absentee ballots or ballot applications have already been rejected under [Georgia's] signature-matching provisions."<sup>4</sup> The list goes on and further back: from 2012 to 2016, "Georgia purged 1.4 million people from the voter rolls."<sup>5</sup> Brian Kemp, the Republican gubernatorial candidate and current governor, was also Secretary of State, and under his watch, Georgia implemented strict voter-identification laws, the closure of polling places, and investigations into voter-registration drives.<sup>6</sup>

Georgia's "constitutional train wreck" may have been inevitable given the dismantling of the Voting Rights Act ("VRA") in 2013,<sup>7</sup> federal legislation passed in 1965 to require preclearance of election laws in mostly Southern states, and banning racially discriminatory literacy tests as a voter registration requirement.<sup>8</sup> Yet, alongside Georgia's microcosm of

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<sup>2</sup> Johnny Kauffman, *Georgia Law Allows Tens Of Thousands To Be Wiped From Voter Rolls*, NPR (Oct. 22, 2018, 5:04 AM), <http://www.npr.org/2018/10/22/659416485/georgia-s-use-it-or-lose-it-law-wipes-voters-from-rolls> [<http://perma.cc/BG64-32D3>].

<sup>3</sup> Brentin Mock, *How Dismantling the Voting Rights Act Helped Georgia Discriminate Again*, CITYLAB (Oct. 15, 2018), <http://www.citylab.com/equity/2018/10/how-dismantling-voting-rights-act-helped-georgia-discriminate-again/572899/> [<http://perma.cc/N6EQ-3PD8>].

<sup>4</sup> Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order at 1–2, *Ga. Muslim Voter Project v. Kemp*, 2018 WL 7822108 (N.D. Ga. Oct. 16, 2018) (No. 1:18cv04789), ECF No. 5.

<sup>5</sup> Ari Berman, *How Gerrymandering and Voter Suppression Paved the Way for Abortion Bans*, MOTHER JONES (May 17, 2019), <http://www.motherjones.com/politics/2019/05/gerrymandering-voter-suppression-abortion-heartbeat-bills/> [<http://perma.cc/P2X5-MC59>].

<sup>6</sup> Ronald Brownstein, *The Ghosts of the 1960s Haunt the Georgia Governor's Race*, ATLANTIC (Nov. 5, 2018), <http://www.theatlantic.com/politics/archive/2018/11/stacey-abrams-voting-rights-and-future-georgia/574864/> [<http://perma.cc/QT5J-AVF3>]; P.R. Lockhart, *Georgia, 2018's most prominent voting rights battleground, explained*, VOX, <http://www.vox.com/policy-and-politics/2018/10/26/18024468/georgia-voter-suppression-stacey-abrams-brian-kemp-voting-rights> [<http://perma.cc/3LL4-QXZK>] (last updated Nov. 6, 2018, 8:35 PM).

<sup>7</sup> Mock, *supra* note 3.

<sup>8</sup> Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, *partially invalidated by* *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); Kara Brandeisky et al., *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014, 12:31 PM), <http://www.propublica.org/article/voting-rights-by-state-map> [<http://perma.cc/4X78-MPZ4>].

the national voter suppression crisis, Stacey Abrams' historic gubernatorial candidacy expanded attention to abortion rights and the broader reproductive justice movement. A reproductive justice activist, Monica Simpson, noting the catalyzing effects of Abrams' campaign, said, "We benefited from a very public and powerful governor's race with Stacey Abrams . . ."<sup>9</sup> Simpson is the executive director of SisterSong, a reproductive justice collective which includes founders of the term and framework, "reproductive justice."<sup>10</sup>

Reproductive justice is often referred to as a framework and theory equipping organizers, activists, and advocates with a lens to apply to all injustice. In 1994, Black women coined this term by uniting the terms "reproductive rights, social justice, and human rights."<sup>11</sup> Reproductive justice centers on "three interconnected human rights values: the right *not to have children* using safe birth control, abortion, or abstinence; the right *to have children* under the conditions we choose; and the right *to parent the children we have* in safe and healthy environments."<sup>12</sup>

The interconnecting concepts of reproductive justice are indicative of the "intersectionality"<sup>13</sup> embedded in the reproductive justice movement. Indeed, reproductive justice organizations like SisterSong, Women of Color, and Reproductive Justice Collective collaborate with a number of individuals and organizations to address a myriad of systemic policies and cultural practices that constrict marginalized communities.<sup>14</sup> Marginalized communities include people of color, immigrants, the LGBTQIA+ community, young people, disabled individuals, and low-income individuals. Ultimately, if reproductive justice is achieved for the most marginalized, then all other identities and communities will also have rights.

Despite reproductive justice's intersections with other social justice issues, there is often a trichotomy presented between reproductive health, reproductive rights, and reproductive justice:

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<sup>9</sup> Gomez, *supra* note 1.

<sup>10</sup> *Reproductive Justice*, SISTERSONG, <http://www.sistersong.net/reproductive-justice> [<http://perma.cc/ULA8-9PKZ>] (last visited Jan. 19, 2020).

<sup>11</sup> RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE 18 (Loretta J. Ross et al. eds., 2017).

<sup>12</sup> *Id.* at 14.

<sup>13</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, U. CHI. LEGAL F. 139, 139–68 (1989). Crenshaw, a law professor at Columbia Law School and the UCLA School of Law, first coined the term "intersectionality" in this Article.

<sup>14</sup> Verified Complaint for Declaratory and Injunctive Relief at 6, *SisterSong v. Kemp*, No. 1:19-cv-02973, 2019 WL 4849448 (N.D. Ga. June 28, 2019), ECF No. 1.

1. *Reproductive Health* addresses the delivery of reproductive health services and the expansion and improvement of those services;
2. *Reproductive Rights* is often presented as the legal and advocacy work to protect the rights to access reproductive health care (and related services); and
3. Finally, descriptions of *Reproductive Justice* usually focus on organizing against systemic oppression.<sup>15</sup>

Yet, all three approaches—reproductive health, reproductive rights, and reproductive justice—aim to achieve overarching goals for the reproductive justice movement.<sup>16</sup>

In the wake of increased voter suppression and renewed legislative and policy attacks on reproductive rights and health care access, reproductive justice became a nationally elevated issue. Certainly, voter suppression is a reproductive justice issue. While reproductive justice centers on the most marginalized, similarly, these communities are also the target of disenfranchisement. Even though the Fifteenth Amendment gave rise to a high Black voter turnout, an increased number of registered Black voters, and numerous Black elected officials during Reconstruction, those civil rights victories were dismantled following the removal of federal troops in 1877.<sup>17</sup> This backlash effect is mirrored in the history of reproductive rights. Three years after *Roe v. Wade* legalized abortion, the Hyde Amendment passed, blocking the use of federally funded Medicaid for abortion care.<sup>18</sup> The abortion restriction specifically targeted low-income communities who relied on federally funded health insurance.

The continued backlash and dismantling of *Roe* “targeted first those women who are the most politically disenfranchised

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<sup>15</sup> ASIAN CMTYS. FOR REPRODUCTIVE JUSTICE, *A New Vision for advancing our movement for reproductive health, reproductive rights and reproductive justice*, FORWARD TOGETHER, <http://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf> [<http://perma.cc/GD7Q-24X6>] (last visited Jan. 19, 2020); see also RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE, *supra* note 11, at 11.

<sup>16</sup> ASIAN CMTYS. FOR REPRODUCTIVE JUSTICE, *supra* note 15; RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE, *supra* note 11, at 15.

<sup>17</sup> Val Brown & Anya Malley, *Finding Our Power*, TEACHING TOLERANCE (Spring 2019), <http://www.tolerance.org/magazine/spring-2019/finding-our-power> [<http://perma.cc/CT8L-3NC9>] (interviewing and featuring Carol Anderson, a professor at Emory University in Atlanta, Georgia and author of the recently published, *One Person, No Vote: How Voter Suppression Is Destroying Our Democracy*).

<sup>18</sup> Ally Boguhn, *Here's What You Need to Know About the Hyde Amendment and Efforts to End It*, REWIRE NEWS (June 21, 2019, 10:28 AM), <http://rewire.news/article/2019/06/21/heres-what-you-need-to-know-about-the-hyde-amendment-and-efforts-to-end-it/> [<http://perma.cc/AA6R-JV59>]; see also Hyde Act, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

and thus the least [likely] to protect their rights in the lawmaking process.”<sup>19</sup> The dismantling of *Roe* occurs and continues alongside voter disenfranchisement. The Supreme Court decided *Roe* in 1973, and a decade later, women became and remain a majority voting bloc in presidential elections.<sup>20</sup> Starting in 1982, around the same time as the women majority voting bloc, and through 2006, the Department of Justice blocked 700 proposed changes to voting laws under the preclearance provision of the VRA.<sup>21</sup> When the Supreme Court nullified parts of the VRA in *Shelby County v. Holder*,<sup>22</sup> states began passing more abortion restrictions.<sup>23</sup> Thus, although we celebrate the 100 year anniversary of the Nineteenth Amendment’s establishment of women’s voting rights, a woman’s right to vote, as well as the reproductive rights of all individuals, are under attack.

This Article is just the beginning of an exploration of voter suppression as a reproductive justice issue. To support the exploration, Part II addresses reproductive justice lawyering and, therefore, provides a brief overview of the reproductive justice movement. Next, Part III continues with an overview of women as voters, the significance of women voters, and how women voters are suppressed. The Article ends with Part IV—which harkens back to Part I and the 2018 Georgia gubernatorial race and Stacey Abrams’ historic campaign—to offer an insightful and positive outlook on reproductive justice lawyering and voter suppression.

## II. A BRIEF HISTORY OF REPRODUCTIVE JUSTICE LAWYERING

Is reproductive justice lawyering a practice area or a framework?<sup>24</sup> Given the new and evolving nature of the phrase, “reproductive justice,” published scholarship is minimal and certainly not definitive on reproductive justice combined with the

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<sup>19</sup> LORETTA J. ROSS, *African American Women and Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000* 98 (Rickie Solinger ed., 1998).

<sup>20</sup> Charlene Carruthers, *The Right to Vote Affects the Power to Choose: How Voter Suppression in 2012 Will Erode Reproductive Rights*, REWIRE NEWS (July 13, 2012, 8:39 AM), <http://rewire.news/article/2012/07/13/power-to-vote-affects-our-power-to-choose-how-voter-suppression-in-2012-affects-r/> [<http://perma.cc/6DK4-HN9L>].

<sup>21</sup> Brown & Malley, *supra* note 17.

<sup>22</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

<sup>23</sup> Julie Zuckerbrod, *Why Voter Suppression Is a Problem for Reproductive Rights and Justice*, NAT’L WOMEN’S L. CTR. (Aug. 15, 2019), <http://nwlc.org/blog/why-voter-suppression-is-a-problem-for-reproductive-rights-and-justice/> [<http://perma.cc/4X7W-5VCZ>].

<sup>24</sup> *Lawyering for Reproductive Justice: Convening Report*, IF/WHEN/HOW (2016), <http://www.ifwhenhow.org/resources/lawyering-for-rj-convening-report/> [<http://perma.cc/GT72-A7FY>]. If/When/How posed this question and facilitated a discussion about it as part of a 2016 convening of thirteen legal professionals to discuss overall what it means to “lawyer for reproductive justice.” *Id.* As a newer organization, If/When/How trains law students and new lawyers for reproductive justice. *Id.*

practice of law.<sup>25</sup> Moreover, other pre-existing social justice lawyering and legal scholarship offer definitions and examples that provide insight into whether reproductive justice lawyering is a specialty. For example, during the onset of public interest lawyering, the ACLU, founded in 1920—the same year as the Nineteenth Amendment—was one of the leading organizations providing legal representation for reproductive rights.<sup>26</sup> At the time, the ACLU, from the 1920s through the 1960s, litigated and lobbied issues, including maternity leave, equal pay, employment discrimination, and reproductive oppression.<sup>27</sup> In 1971, before being appointed to the Supreme Court, Ruth Bader Ginsburg established the ACLU Women’s Rights Project.<sup>28</sup> A few years later in 1974, the ACLU established its Reproductive Freedom Project.<sup>29</sup> While the ACLU sometimes refers to their past work as “women’s rights” or “reproductive rights,” the discussion later in this Part will illuminate the connections to reproductive justice.<sup>30</sup> For another example, some of the tactics and strategies found in movement lawyering—defined as “the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies . . .”—apply to the past and current work of lawyers in the reproductive justice movement.<sup>31</sup>

Ultimately, to define reproductive justice lawyering is to define the reproductive justice movement.<sup>32</sup> Indeed, an integral

<sup>25</sup> See, e.g., Gemma Donofrio, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement*, 42 N.Y.U. REV. L. & SOC. CHANGE 221, 221 (2018); Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 71, 71 (2011).

<sup>26</sup> See Donofrio, *supra* note 25, at 234 (citing Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1234–35 (2005)); see also *About the ACLU Reproductive Freedom Project*, ACLU, <http://www.aclu.org/other/about-aclu-reproductive-freedom-project> [<http://perma.cc/W4SD-VR5E>] (last visited Nov. 24, 2019).

<sup>27</sup> See *The ACLU and Women’s Rights: Proud History, Continuing Struggle*, ACLU, <http://www.aclu.org/other/aclu-and-womens-rights-proud-history-continuing-struggle> [<http://perma.cc/58UK-9DXD>] (last visited Nov. 25, 2019).

<sup>28</sup> *The History of the ACLU Women’s Rights Project*, ACLU, <http://www.aclu.org/other/history-aclu-womens-rights-project> [<http://perma.cc/TS8S-754Z>] (last visited Nov. 27, 2019).

<sup>29</sup> See *About the ACLU Reproductive Freedom Project*, *supra* note 26.

<sup>30</sup> *Id.*; *The ACLU and Women’s Rights: Proud History, Continuing Struggle*, *supra* note 27.

<sup>31</sup> Scott L. Cummings, *Movement Lawyering*, 5 U. ILL. L. REV. 1645, 1690 (2017) (emphasis removed).

<sup>32</sup> The reproductive rights and reproductive justice movements are global; however, this Article only provides an overview of reproductive justice in the United States. The keyword is “overview.” Consult the cited sources for an expanded introduction to the reproductive justice movement. Additionally, while the term reproductive justice is not entirely synonymous with reproductive rights, because reproductive justice was only



component of movement lawyering places the movement “at the center of the story.”<sup>33</sup> Therefore, this Part primarily focuses on the reproductive justice movement and its resulting and growing framework through a brief and select history. More importantly, this Part’s overview of the reproductive justice movement provides necessary background information to connect the movement, with the help of later parts, to voter suppression and the overarching insight of this Article.

#### A. Before *Roe*

*“All I ever been is a woman slave which is worst [sic] than a woman and worst [sic] than a slave.”*<sup>34</sup>

The story of the reproductive justice movement did not begin when twelve Black women coined the term “reproductive justice” in 1994.<sup>35</sup> Loretta Ross, one of the twelve women, writes about discovering a long history of Black women engaging in advocacy and activism for reproductive justice.<sup>36</sup> The coining of the term essentially captured the past work of Black women and other women of color,<sup>37</sup> and sowed the seeds for continuing the work.

During the nineteenth century, women of color endured reproductive oppression, slavery, racial exclusion, and genocide.<sup>38</sup> Laws were passed to control female slaves’ bodies and reproduction, including a 1662 law in the Virginia Colony redefining the freedom status of every child based on the father.<sup>39</sup> To resist reproductive oppression and slavery, Black women, as

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coined in 1994, in some instances the two terms are accurately used interchangeably by individuals and groups whose work explicitly addresses reproductive justice. Lastly, there are multiple variations on the definition of reproductive justice. As aforementioned in the Article’s introduction and later, this Article applies the following definition and values for reproductive justice: the right to have children, the right not to have children, and the right to parent children. Later, this section of the Article provides an overview of how the reproductive justice framework applies access, systemic oppression, and intersecting identities to the three main values of reproductive justice.

<sup>33</sup> Cummings, *supra* note 31, at 1651; *see also* Donofrio, *supra* note 25, at 251.

<sup>34</sup> Pamela D. Bridgewater, *Ain’t I A Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN’S L.J. 89, 90 (2005). Pamela D. Bridgewater Toure, the late author, was a reproductive justice lawyer and scholar. Here, she recreates Sojourner Truth’s voice “for [her] own purposes.” *Id.* at 90 n.2.

<sup>35</sup> *See* Loretta J. Ross, *Reproductive Justice as Intersectional Feminist Activism*, 19 SOULS 286, 286 (2017).

<sup>36</sup> *See* ROSS, *supra* note 19, at 161, 164; *see also* Jael Silliman et al., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 7 (Haymarket Books, 2016) (2004).

<sup>37</sup> Women of color coined the phrase “women of color” in 1977, which includes women and femmes from the Native American, Black, Asian American, and Latin communities. SILLIMAN, *supra* note 36, at 10; *see also* *Our History*, SISTERSONG, <http://www.sistersong.net/mission> [<http://perma.cc/7K2Q-M6WP>] (last visited Nov. 27, 2019).

<sup>38</sup> *See generally* LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 23–27 (2017).

<sup>39</sup> *See id.* at 18–19.

female slaves, engaged in fertility activism, including sharing information about herbs and other readily available substances that could induce an abortion or function as a contraceptive and prevent pregnancy.<sup>40</sup> When the federal government passed the Indian Removal Act of 1830 and gave the U.S. military the power to forcibly remove and march Native Americans, pregnant women and mothers suffered as they crossed U.S. terrain.<sup>41</sup> In fact, “Cherokee women led [a] resistance against [forced] removal.”<sup>42</sup> For another example, the Immigration Act of 1924 required visas and photographs for all immigrants, which was financially burdensome for Mexicans.<sup>43</sup> Additionally, the Immigration Act of 1924 banned Asians and their descendants.<sup>44</sup>

In order to control women, states also criminalized abortion throughout the nineteenth century.<sup>45</sup> Abortion statutes existed in all states by the end of the nineteenth century.<sup>46</sup> In general, the abortion statutes criminalized the use of abortifacients or instruments to induce an abortion, “unless necessary to preserve the woman’s life.”<sup>47</sup>

Ultimately, the beginning of the reproductive justice movement’s story is reproductive oppression, racial injustice, and the ways in which Black women and other women of color organized and engaged in activism.<sup>48</sup> Meanwhile, the mainstream reproductive rights movement began with a focus on the needs and desires of middle and upper-class women, and failed to acknowledge the reproductive oppression of Black women and other women of color.<sup>49</sup> Instead, at its start, the reproductive rights movement centered access to contraception and abortion.<sup>50</sup> Therefore, the beginning of the mainstream reproductive rights movement coincides with the beginning of the birth control movement.<sup>51</sup> Referred to (and still to this day, by some) as “the mother of birth control,” Margaret Sanger coined the phrase

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<sup>40</sup> See *id.* at 20.

<sup>41</sup> See *id.* at 21–22.

<sup>42</sup> See *id.* at 22.

<sup>43</sup> See *id.* at 31–32.

<sup>44</sup> See *id.* at 32.

<sup>45</sup> See Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1783–84 (1991).

<sup>46</sup> See *id.* at 1784.

<sup>47</sup> *Id.*; see also Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 435 (1961). According to Buell, Quay’s article includes the statutes passed over time in all fifty states. See Buell, *supra* note 45, at 1784 n.44.

<sup>48</sup> See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 3–4 (1997).

<sup>49</sup> See *id.* at 10; see also Bridgewater, *supra* note 34, at 130.

<sup>50</sup> See ROBERTS, *supra* note 48, at 5.

<sup>51</sup> See *id.*

“birth control” in 1914.<sup>52</sup> The same year, Sanger was arrested for violating the Comstock Law, which classified birth control literature as “obscene” and banned the distribution of any birth control literature.<sup>53</sup> Two years later, Sanger opened the first birth control clinic in the U.S. and later founded the American Birth Control League, the latter of which became a part of Planned Parenthood Federation of America, a national reproductive rights organization.<sup>54</sup>

The ACLU represented Sanger in later arrests,<sup>55</sup> and also represented another birth control proponent, Mary Ware Dennett.<sup>56</sup> Dennett is the founder of the National Birth Control League and the Voluntary Parenthood League.<sup>57</sup> By the time the Supreme Court legalized contraception, both Sanger and Dennett had lobbied, been arrested, and spent many years fighting for women to have more reproductive freedom.<sup>58</sup> Finally, in 1965, the Supreme Court in *Griswold v. Connecticut* ruled that states could not deny married couples contraception, and in 1972, the Supreme Court’s ruling in *Eisenstadt v. Baird* gave access to contraception for unmarried people.<sup>59</sup>

The story often left out of the birth control movement is the eugenics movement in the U.S.—a parallel movement seeking population control, grounded in racist ideology.<sup>60</sup> Like Sanger and Dennett, eugenicists were proponents of birth control, but eugenicists viewed birth control as a means of preventing the reproduction of those they deemed “genetically inferior,” including immigrants, the descendants of slaves, Native Americans, the poor, and the criminalized.<sup>61</sup> Essentially, eugenicists aimed to control the population of non-whites.

<sup>52</sup> See *id.* at 57; see also *Margaret Sanger (1879–1966)*, PBS, <http://www.pbs.org/wgbh/americalexperience/features/pill-margaret-sanger-1879-1966/> [<http://perma.cc/UUW3-C6HF>] (last visited Feb. 12, 2020).

<sup>53</sup> See ROBERTS, *supra* note 48, at 57.

<sup>54</sup> See *id.* at 57–58; see also *Our History*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/about-us/who-we-are/our-history> [<http://perma.cc/LRS2-UFHC>] (last visited Nov. 26, 2019).

<sup>55</sup> See *About the ACLU Reproductive Freedom Project*, *supra* note 26.

<sup>56</sup> *ACLU History: Safeguarding Reproductive Freedom*, ACLU, <http://www.aclu.org/aclu-history-safeguarding-reproductive-freedom> [<http://perma.cc/QRT2-FMMC>] (last visited Nov. 24, 2019).

<sup>57</sup> Marjorie Heins, *A Birth-Control Crusader: “The Sex Side of Life”—Mary Ware Dennett’s Pioneering Battle for Birth Control and Sex Education*, ATLANTIC (Oct. 1996), <http://www.theatlantic.com/magazine/archive/1996/10/a-birth-control-crusader/376695/> [<http://perma.cc/2P6D-JRAC>].

<sup>58</sup> See *id.*

<sup>59</sup> *Our History*, *supra* note 54.

<sup>60</sup> See ROBERTS, *supra* note 48, at 59; see also SILLIMAN ET AL., *supra* note 36, at 59.

<sup>61</sup> ROBERTS, *supra* note 48, at 59; see also SILLIMAN ET AL., *supra* note 36, at 59.

Black women and other women of color's participation in the birth control movement is complex, as they continued to seek fertility control methods, especially as a means out of poverty following slavery.<sup>62</sup> Further complicating the story of the birth control movement and women of color is the mother of birth control's complicit relationship with the eugenics movement. Legal scholar, Dorothy Roberts, argues that although Sanger may have pushed for birth control as simply reproductive freedom for all women, Sanger's coining and usage of the term "birth control" suggests an intention to align with the language perpetuated by eugenicists.<sup>63</sup>

The eugenics movement also had its own parallel movement, the sterilization movement. Indeed, the aforementioned Immigration Act of 1924 highlights the crossover of eugenics and sterilization laws.<sup>64</sup> Prior to the Immigration Act of 1924, a lobbyist for eugenics, Harry Hamilton Laughlin, implemented a survey to prove that immigrants made up a high percentage of the U.S.'s "socially unfit" population.<sup>65</sup> The eugenics and sterilization movements in 1927 shared a historical moment when the Supreme Court in *Buck v. Bell* upheld Virginia's compulsory sterilization statute.<sup>66</sup> Supreme Court Justice Oliver Wendell Holmes, perhaps not readily known as a eugenicist, wrote the Court's decision and infamously said, "Three generations of imbeciles are enough."<sup>67</sup> Following the decision, states passed forced sterilization statutes and approximately 70,000 Americans were sterilized.<sup>68</sup>

The reproductive justice movement's story continues, as women of color organized against forced sterilization. Black women, Latina, and Native American groups recorded and disseminated information about being forcibly and, sometimes unknowingly, sterilized.<sup>69</sup> A first-of-its-kind civil suit filed by Creek-Shawnee Native American Norma Jean Serena, in 1973,

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<sup>62</sup> See ROBERTS, *supra* note 48, at 15; see also SILLIMAN ET AL., *supra* note 36, at 15.

<sup>63</sup> *Intersectionality Matters with Kimberlé Crenshaw: What Slavery Engendered: An Intersectional Look at 1619*, AFR. AM. POL'Y F. (Nov. 14, 2019) (downloaded using iTunes); see also ROBERTS, *supra* note 48, at 76–81 (discussing Sanger's possible political strategy and whether she was a racist).

<sup>64</sup> See ROBERTS, *supra* note 48, at 68.

<sup>65</sup> *Id.* at 67–68.

<sup>66</sup> *Id.* at 69.

<sup>67</sup> *Id.*; see also *The Supreme Court Ruling That Led To 70,000 Forced Sterilizations*, NPR (Mar. 24, 2017, 3:46 PM), <http://www.npr.org/2017/03/24/521360544/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> [<http://perma.cc/BX3K-77NC>].

<sup>68</sup> See ROBERTS, *supra* note 48, at 69; see also *The Supreme Court Ruling That Led To 70,000 Forced Sterilizations*, *supra* note 67.

<sup>69</sup> SILLIMAN ET AL., *supra* note 36, at 16.

documented sterilization abuse.<sup>70</sup> Represented by the Council of Three Rivers American Indian Center, Serena won a partial victory against the Department of Public Welfare.<sup>71</sup> The jury awarded \$17,000 in damages and restored her custody of her two young children.<sup>72</sup> The jury decided Serena had given consent to be sterilized.<sup>73</sup> Despite the incomplete legal victory, the civil suit exemplifies a movement lawyering strategy and result, given that the general public was exposed to the oppressive injustice of forced sterilization, especially affecting women of color.<sup>74</sup>

Continued public exposure to the forced sterilization of women of color ensued the following year in *Relf v. Weinberger*.<sup>75</sup> The state of Alabama sterilized the Relf sisters, young Black girls, without the knowledge and consent of their parents.<sup>76</sup> Their story was a part of a class action suit advanced by the Southern Poverty Law Center.<sup>77</sup> As a result, the federal government passed sterilization guidelines.<sup>78</sup>

There are many more examples of the forced sterilization of women of color that this Article does not cover. Interestingly enough, there are no examples of white middle-class women, as they did not suffer forced sterilization and, even when attempting to engage in voluntary sterilization, doctors hesitated and enacted multiple barriers.<sup>79</sup> The gap between the sterilization experiences of white middle-class women and women of color exemplifies the mainstream reproductive rights movement's failure to align with the reproductive justice movement. Overall, the mainstream reproductive rights movement did not center the lived stories of reproductive oppression and control women of color continue to face.

Foreshadowing reproductive justice and incorporating the lived stories of women, *Abramowicz v. Lefkowitz* challenged an abortion law in New York.<sup>80</sup> Lawyers from the Center for Constitutional Rights made up an all-women legal team (unusual

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<sup>70</sup> *Id.* at 17; see also Sally J. Torpy, *Native American Women and Coerced Sterilization: On the Trail of Tears in the 1970s*, 24 AM. INDIAN CULTURE & RES. J. 1, 5 (2000), <http://uclajournals.org/doi/10.17953/aicr.24.2.7646013460646042> [<http://perma.cc/Z9GM-EJVF>].

<sup>71</sup> Torpy, *supra* note 70, at 4.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 4–5.

<sup>75</sup> 372 F. Supp. 1196 (D.D.C. 1974), *on remand sub nom.*, *Relf v. Matthews*, 403 F. Supp. 1235 (D.D.C. 1975), *vacated sub nom.*, *Relf v. Weinberger*, 565 F.2d 722 (D.C. Cir. 1977).

<sup>76</sup> ROBERTS, *supra* note 48, at 93.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 94; see also 42 C.F.R. §§ 50.201–50.207 (2018).

<sup>79</sup> See ROBERTS, *supra* note 48, at 95.

<sup>80</sup> *Hall v. Lefkowitz (Abramowicz v. Lefkowitz)*, 305 F. Supp. 1030 (S.D.N.Y. 1969).

for the time) to bring the suit as a class action.<sup>81</sup> There were 109 women plaintiffs, many of whom were interviewed by the lawyers, Florynce “Flo” Kennedy and Diane Schuder.<sup>82</sup> About twelve women showed up to testify to their stories contained in the brief about how they were personally oppressed and overall affected by New York’s abortion law.<sup>83</sup> They showed up to tell the stories about their abortions. The suit was later rendered moot when the New York law was changed, but *Abramowicz* inspired the current trend of storytelling through testimony and in briefs.<sup>84</sup> Moreover, the legal strategy of incorporating the diverse lived experiences of women to argue for change foreshadows the coining of reproductive justice and modern reproductive justice lawyering.

## B. After *Roe* and the Coining of Reproductive Justice

*“The key words are ‘if she chooses.’”*<sup>85</sup>

Abortion was the primary goal of the mainstream reproductive rights movement; therefore, after the Supreme Court decided a person has a right to choose an abortion in *Roe*, reproductive rights advocates claimed a victory.<sup>86</sup> Women of color knew better; their lived experiences and the reproductive and racial harm their ancestors suffered taught them better. While abortion rights advocates promoted pro-choice language post *Roe*, women of color focused on the limitations of that “choice.”<sup>87</sup>

The Hyde Amendment is a manifestation of the detrimental and downward spiral nature of a pro-choice framework. As previously mentioned, Congress passed the Hyde Amendment in 1976 at the start of continuous backlash to *Roe*.<sup>88</sup> Worsening the backlash was the failure of the mainstream reproductive rights movement to galvanize support to fight the Hyde Amendment,

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<sup>81</sup> *Abramowicz v. Lefkowitz Historic Case*, CTR. FOR CONST. RTS., <http://ccrjustice.org/home/what-we-do/our-cases/abramowicz-v-lefkowitz> [<http://perma.cc/8JAM-B5JH>] (last visited Nov. 19, 2019); see also Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1885 (2010).

<sup>82</sup> Siegel, *supra* note 81; Dr. Cynthia Greenlee, *How Abortion Storytelling Was Born*, REWIRE NEWS (Jan. 22, 2016, 4:48 PM), <http://rewire.news/article/2016/01/22/abortion-storytelling-born/> [<http://perma.cc/U4YW-FFFU>].

<sup>83</sup> Greenlee, *supra* note 82.

<sup>84</sup> Siegel, *supra* note 81, at 1886.

<sup>85</sup> SILLIMAN ET AL., *supra* note 36, at 11.

<sup>86</sup> See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

<sup>87</sup> Marlene Gerber Fried, *Reproductive Rights Activism in the Post-Roe Era*, 103 AM. J. PUB. HEALTH 10, 11 (2013).

<sup>88</sup> See Maggie Astor, *What is the Hyde Amendment? A Look at Its Impact as Biden Reverses His Stance*, N.Y. TIMES (June 7, 2019), <http://www.nytimes.com/2019/06/07/us/politics/what-is-the-hyde-amendment.html> [<http://perma.cc/95AV-7W4D>].

which stripped federally funded Medicaid use for abortions.<sup>89</sup> “However inadvertently, the pro-choice movement had sent a message that the dilemmas of women of color and low-income women were not its priorities,” argues Marlene Gerber Fried, a reproductive rights activist and co-author of *Undivided Rights: Women of Color Organize for Reproductive Justice*.<sup>90</sup> The lack of intention coupled with grave effects harkens back to Dorothy Roberts’ argument about whether Sanger’s birth control advocacy aligned with eugenicists. Indeed, a pattern of unintended but deleterious and worsening effects continued when pro-choice advocates, including Planned Parenthood, opposed efforts for federal guidelines to stop forced sterilization on the basis of a woman’s individual choice.<sup>91</sup>

Despite the failures of the mainstream reproductive rights and pro-choice rhetoric, when Black women in 1994 planted the seeds for the reproductive justice framework, reproductive justice then and now was about more than simply changing or replacing pro-choice and reproductive rights frameworks.<sup>92</sup> In other words, Black women did not coin reproductive justice because the mainstream reproductive rights movement was wholly inept at addressing the injustices suffered by Black women and women of color. One of the founding mothers of reproductive justice, Toni M. Bond Leonard, states that the initial purpose behind reproductive justice was, and continues to be, the “centering [of] black women . . . moving [their] voices from the margins to the center of the discourse.”<sup>93</sup> If Black women as marginalized identities are centered, then regardless of the movement—reproductive rights, pro-choice, women’s rights, etc.—questions about “[i]nstitutional, cultural, language, and educational barriers” will be asked when advocating for tactics and solutions to any injustice to any person.<sup>94</sup> Furthermore, the reproductive justice framework calls for an intersectional approach to the varying “forms of oppression that threaten . . . bodily integrity and autonomy.”<sup>95</sup> Unabashedly, like the purposeful retelling behind the previously mentioned words, “*All I ever been is a woman slave which is worst [sic] than a*

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<sup>89</sup> Marlene Gerber Fried, *Reproductive Rights Activism After Roe*, in *RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE* 143 (Loretta J. Ross et al. eds., 2017).

<sup>90</sup> *Id.*; see also Marlene Fried, HAMPSHIRE.EDU, <http://www.hampshire.edu/faculty/marlene-fried> [<http://perma.cc/8T4M-4WPL>] (last visited Nov. 29, 2019).

<sup>91</sup> See Fried, *supra* note 90, at 145.

<sup>92</sup> See Toni M. Bond Leonard, *Laying the Foundations for a Reproductive Justice Movement*, in *RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE* 45–46 (Loretta J. Ross et al. eds., 2017).

<sup>93</sup> *Id.* at 46.

<sup>94</sup> ROBERTS, *supra* note 48, at 229.

<sup>95</sup> Leonard, *supra* note 92, at 47.

woman and worst [sic] than a slave,”<sup>96</sup> at the onset of the reproductive justice framework was an intention to tell and act on complete stories.

Whether a framework or a legal specialty, reproductive justice lawyering necessitates storytelling. Recall as an example, the aforementioned *Abramowicz* case that incorporated women’s abortion stories as testimony. Similarly, lawyers in voting rights cases have incorporated storytelling. Centering the lived experiences of marginalized, minority voters—essentially sharing stories from their everyday lives—proved effective in a Texas case concerning a voter ID law.<sup>97</sup> The court of appeals praised a Fifth Circuit judge for rendering a decision based on the stories of individual citizens and the barriers they faced.<sup>98</sup> Thus, while Part III delves further into voting rights and, consequently, into its dark side highlighting voter suppression, storytelling strongly suggests a beacon of hope for lawyers fighting to protect reproductive rights and voting rights.

### III. IMPORTANCE OF WOMEN VOTERS AND VOTER SUPPRESSION

#### A. How Women Voted: The 1920 Presidential Election

The 1920 Presidential Election presented a unique opportunity to see how newly enfranchised women would exercise their newly guaranteed right to vote. While most western states permitted women to vote prior to the Nineteenth Amendment, the Nineteenth Amendment required all states to guarantee the right to all women.<sup>99</sup> Women were expected to show up in droves at the polls and to support Republican candidates who pushed for women’s right to vote. To the disappointment of many, the opposite happened.

The 1920 Presidential Election endured a sharp drop in overall voter turnout.<sup>100</sup> Some blamed women for the decrease in voter turnout. Researchers estimated that between thirty-four and forty-six percent of eligible female voters voted.<sup>101</sup> Women’s

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<sup>96</sup> Bridgewater, *supra* note 34 (emphasis added).

<sup>97</sup> Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 155 (2018).

<sup>98</sup> *Id.* at 153.

<sup>99</sup> Mona Morgan-Collins, *Votes for and by Women: How did Women Vote After the Nineteenth Amendment?* 10 (London Sch. of Econ. Political Sci. & Political Econ. Research Grp., Working Paper No. 1, 2016), <http://www.lse.ac.uk/government/Assets/Documents/pdf/research-groups/pspe/working-papers/Mona-Morgan-Collins-Votes-For-and-by-Women.pdf> [<http://perma.cc/HRZ2-VYPK>].

<sup>100</sup> See Sara Alpern & Dale Baum, *Female Ballots: The Impact of the Nineteenth Amendment*, 16 J. INTERDISC. HIST. 43, 57 (1985).

<sup>101</sup> *Id.* at 45–46.



suffrage was characterized as a “failure,” “tremendous disappointment,” and that “women had promised that their votes would deliver too much.”<sup>102</sup>

Voter turnout was not the only disappointment. Some were disappointed or surprised that a women’s voter bloc never emerged. Women were expected to align with the Republican Party who enfranchised them.<sup>103</sup> Some politicians even feared the power of a women’s voting bloc and the impact it could have on politics.<sup>104</sup> However, many suffragist leaders openly objected to a women’s voting bloc, instead intentionally choosing to lead and support non-partisan groups like the League of Women Voters led by Carrie Chapman Catt.<sup>105</sup> She argued that women should reject the idea of voting together as a bloc.<sup>106</sup> This idea may have been based on the dangerously false assumption that with suffrage, women achieved equal status with men and did not need a female agenda. Opponents of a women’s voting bloc argued that women should be seen as human beings first rather than women first.<sup>107</sup>

Unfortunately, this strategy of avoiding a women’s bloc caused more harm than good. As Sara Alpern and Dale Braum write, “Wanting to be seen as competent human beings inhibited women from running for political office as conscious feminists.”<sup>108</sup> Women assumed that obtaining the right to vote meant men saw them as equals—quite the contrary. Women were voted against for being women, and because a women’s bloc to support women candidates was non-existent, women were not recognized as viable candidates. Women who were against a women’s bloc missed out on the opportunity to push for female equality because they believed they had already obtained it with the right to vote.<sup>109</sup>

To further complicate matters, the absence of a women’s voter bloc reinforced stereotypes that women voted like their husbands or fathers, and did not think for themselves.<sup>110</sup> Researchers have since found that the opposite was true. Mona Morgan-Collins argues that most women who voted in the 1920 election voted distinctly from men, contributing to the

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<sup>102</sup> *Id.* at 47, 56–57.

<sup>103</sup> *See* Morgan-Collins, *supra* note 99, at 1.

<sup>104</sup> Alpern & Baum, *supra* note 100, at 43.

<sup>105</sup> *Id.*

<sup>106</sup> *See id.* at 61.

<sup>107</sup> *See id.*

<sup>108</sup> *Id.* at 63.

<sup>109</sup> *See id.*

<sup>110</sup> *See* Morgan-Collins, *supra* note 99, at 1.

Republican landslide in the 1920 election.<sup>111</sup> Republicans were responsible for passing the Nineteenth Amendment that enfranchised women, so it makes sense that women would lean towards the party that enfranchised them. Women voted for Republican candidates more often than men did in the 1920 election, with the exception of women in the Southern Black Belt.<sup>112</sup> Women in the Southern Black Belt voted for Democratic candidates as much as white men did.<sup>113</sup>

The Southern Black Belt is identified as the region between Eastern Texas to Virginia and Maryland.<sup>114</sup> Voters in the Southern Black Belt tended to side with the Democrats who promoted ideals related to white supremacy.<sup>115</sup> While most women in other parts of the nation voted for Republican candidates during the 1920 election, women in the Southern Belt chose the Democratic Party.<sup>116</sup> Women in the Southern Black Belt had an interest in promoting white supremacy and voted to protect that interest. This is evidence that women chose the party that best supported their interests.

While voter turnout and the lack of a women's voter bloc were disappointments for feminists, there were some victories that emerged from the 1920 election. As previously stated, Republicans claimed a landslide victory, which was due in part to the support of women. The Sheppard-Towner Maternity and Infancy Act of 1921 was another victory that resulted from women's involvement in the 1920 election.<sup>117</sup>

The Sheppard-Towner Maternity and Infancy Act of 1921 may have been the first victory for reproductive rights after the passing of the Nineteenth Amendment. The act was sponsored by Jeanette Rankin, the first woman elected to Congress.<sup>118</sup> She was elected in 1916, four years before the passing of the Nineteenth Amendment.<sup>119</sup> Rankin sponsored the act in 1918, but it was not

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<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 3.

<sup>114</sup> See *id.* at 2.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See Liette Gidlow, *Beyond 1920: The Legacies of Woman Suffrage*, NAT'L PARK SERV., <http://www.nps.gov/articles/beyond-1920-the-legacies-of-woman-suffrage.htm> [<http://perma.cc/RAR4-ZZVE>] (last visited Mar. 9, 2020).

<sup>118</sup> See *The Sheppard-Towner Maternity and Infancy Act*, HIST., ART & ARCHIVES, <http://history.house.gov/Historical-Highlights/1901-1950/The-Sheppard-Towner-Maternity-and-Infancy-Act/> [<http://perma.cc/W2T6-FA3W>] (last visited Mar. 9, 2020).

<sup>119</sup> See RANKIN, *Jeannette*, HIST., ART & ARCHIVES, [http://history.house.gov/People/Listing/R/RANKIN,-Jeannette-\(R000055\)/](http://history.house.gov/People/Listing/R/RANKIN,-Jeannette-(R000055)/) [<http://perma.cc/CRX9-RHKF>] (last visited Mar. 9, 2020).

passed until 1921, after women earned the right to vote.<sup>120</sup> By this time, Rankin was no longer in Congress.<sup>121</sup> The Act was named after the two male senators that reintroduced it in 1920.<sup>122</sup> The Act provided one million dollars in federal aid per year for five years to states to promote “the welfare and hygiene of maternity and infancy.”<sup>123</sup> In order to receive the funds granted by the act, states had to enact legislation and allocate money toward the cause. Congress would then grant the funds in proportion to the amounts that the state spent toward maternal and infancy care, up to a certain amount.<sup>124</sup> One study found that a state’s participation in the Sheppard-Towner Act correlated with whether the state had recently granted women the right to vote.<sup>125</sup> States with newly enfranchised women (women who did not receive the right to vote until 1920) accepted a larger share of the money than states where women had the right to vote before 1917.<sup>126</sup>

The Act is credited with creating almost 3,000 child and maternal health care centers and providing education on maternal and infancy issues, which in part led to a decrease in infant mortality.<sup>127</sup> The passing of this Act was a result of lobbying efforts of women’s organizations and fear that women would retaliate at the polls if congressional members failed to pass the act.<sup>128</sup>

The 1920 presidential election presented both disappointments and victories. Some were disappointed with women voter’s turnout and the fact that a voting bloc never emerged. Despite the disappointing turnout, women are still credited, at least in part, with the Republican landslide that put President Warren G. Harding in office.<sup>129</sup> Additionally, women were able to lobby and cause enough fear in Congress to push forth the Sheppard-Towner Maternity and Infancy Act to provide

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<sup>120</sup> See *The Sheppard-Towner Maternity and Infancy Act*, *supra* note 118.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> Sheppard-Towner Maternity and Infancy Protection Act, 42 U.S.C. §§ 161–175 (1925).

<sup>124</sup> *Id.*

<sup>125</sup> See Carolyn M. Moehling & Melissa A. Thomasson, *The Political Economy of Saving Mothers and Babies: The Politics of State Participation in the Sheppard-Towner Program*, 72 J. ECON. HIST. 75, 77 (2012).

<sup>126</sup> See *id.* at 91.

<sup>127</sup> See J. Stanley Lemons, *The Sheppard-Towner Act: Progressivism in the 1920s*, 55 J. AM. HIST. 776, 785 (1969).

<sup>128</sup> Morgan-Collins, *supra* note 99, at 8.

<sup>129</sup> Greg Bailey, *This Presidential Speech on Race Shocked the Nation . . . in 1921*, NARRATIVELY (Oct. 26, 2016), <http://narratively.com/this-presidential-speech-on-race-shocked-the-nation-in-1921/> [<http://perma.cc/P7TB-BTCF>].

funding for maternal and infancy issues.<sup>130</sup> As noted below, it would take decades before women's turnout exceeded that of men.

## B. The 1992 Presidential Election

The presidential election of 1964 marked the first time that female voters outnumbered male voters.<sup>131</sup> During the 1960s and 1970s, there were several gains in the reproductive rights movement, as noted above in Part II. Married couples gained the right to contraception in 1965;<sup>132</sup> the *Abramowicz* case, which led to a change in New York's abortion law, was heard in 1969;<sup>133</sup> unmarried couples gained the right to contraception in 1972;<sup>134</sup> and the federal government passed sterilization guidelines in 1978.<sup>135</sup> Of course, we cannot forget *Roe* which was decided in 1973.<sup>136</sup> On the surface, there appears to be a positive correlation between women voters outnumbering men in the 1960s and the major advancements in the reproductive rights in the 1970s. Additionally, by 1980, women's voter turnout (the number of eligible voters who actually voted) exceeded that of men.<sup>137</sup> This surge in women's participation at the polls in the 1960s through the 1980s, along with the advancements made in reproductive rights in the 1970s, were the antecedents leading up to the 1992 presidential election.

The presidential election of 1992 is one of historical importance for women. As a result of the 1992 presidential election, women were nominated and elected to Congress at an unprecedented rate.<sup>138</sup> It was so monumental for women that it was dubbed by many as the "Year of the Woman."<sup>139</sup>

Before we dive into the women's political surge in the 1992 election, let's take a look at the events in the 1990s leading up to the presidential election of 1992 that may have impacted

<sup>130</sup> See Susan L. Waysdorf, *Fighting for Their Lives: Women, Poverty, and the Historical Role of United States Law in Shaping Access to Women's Health Care*, 84 KY. L.J. 745, 774 (1996).

<sup>131</sup> See *Gender Differences in Voter Turnout*, CTR. FOR AM. WOMEN & POLITICS (Sept. 16, 2019), <http://www.cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf> [<http://perma.cc/X4S9-A4A3>].

<sup>132</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>133</sup> *Hall v. Lefkowitz* (*Abramowicz v. Lefkowitz*), 305 F. Supp. 1030 (S.D.N.Y. 1969).

<sup>134</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>135</sup> See 42 C.F.R. § 441.253 (1978).

<sup>136</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>137</sup> See *Gender Differences in Voter Turnout*, *supra* note 129.

<sup>138</sup> See *The Year of the Woman, 1992*, HOUSE.GOV, <http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/Assembling-Amplifying-Ascending/Women-Decade/> [<http://perma.cc/6H2D-B3AE>] (last visited Nov. 28, 2019).

<sup>139</sup> See *id.*

women's participation in the election. While the 1960s and the 1970s were marked by advancements for women, the 1990s started off on a different note. There were a few major events that may have impacted women's participation in the 1992 election. First, the notorious confirmation hearing of Supreme Court Justice Clarence Thomas.<sup>140</sup> More specifically, the testimony of Anita Hill on October 11, 1991, which captured the attention of women around the country.<sup>141</sup> Anita Hill testified before an unsympathetic, all-white, male Senate Judiciary Committee about her allegations that Thomas sexually harassed her while she worked for him at both the Department of Education and the Equal Employment Opportunity Commission.<sup>142</sup>

The juxtaposition of the all-male committee firing hostile questions at Hill about her allegations alienated many women and left them wondering where the women in Congress were. While some may have been alienated, other women were ignited into action.<sup>143</sup> Seven house democratic women protested the committee's hostile treatment of Hill.<sup>144</sup> We know for sure that it motivated at least one woman to run for Senate.

Senator Patty Murray blatantly stated watching the hearings motivated her to run.<sup>145</sup> She was left wondering who was there to say what she would have wanted to say during the hearings.<sup>146</sup> Though we cannot know for sure, it is likely that the hearing sparked an interest in politics in many other women. What we do know, is that Hill left an impact on women. Her testimony brought not only sexual harassment to the forefront, but the fact that more women were needed in Congress. After her testimony, complaints of sexual harassment increased at the Equal Employment Opportunity Commission,<sup>147</sup> perhaps signifying that women would no longer remain silent.

The second reason for an influx of women in politics could be the debate over abortion. Leading up to the election, abortion was a key topic. It came up at the confirmation hearing of Justice

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<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *No women served on the Senate Judiciary Committee in 1991. The ugly Anita Hill hearings changed that.*, WASH. POST (Sept. 18, 2018, 12:18 PM), <http://www.washingtonpost.com/history/2018/09/18/no-women-served-senate-judiciary-committee-ugly-anita-hill-hearings-changed-that/> [http://perma.cc/M7DC-X2E4].

<sup>146</sup> *See id.*

<sup>147</sup> *See Erin Blakemore, How Anita Hill's Confirmation Hearing Testimony Brought Workplace Sexual Harassment to Light*, HISTORY (Apr. 2, 2019), <http://www.history.com/news/anita-hill-clarence-thomas-sexual-harassment-confirmation-hearings> [http://perma.cc/Y2MK-783N].

Thomas, it was the subject of the women's march of 1992, and the issue of several Supreme Court cases. During Thomas' confirmation hearings in September 1991, he was questioned extensively about his stance on abortion and *Roe*.<sup>148</sup> He was asked so many questions, Senator Hatch commented that one would think abortion was the only topic the Supreme Court addresses.<sup>149</sup> In his opening statement during the hearings, Senator Patrick J. Leahy stated, "[Abortion] is one of the burning social issues of our time. It is the single issue about which this committee and the American people most urgently wish to know the nominees' views."<sup>150</sup> Despite this, Thomas refused to provide a concrete response to his stance on abortion.

Abortion had long been a hot topic, even before the confirmation hearing held in 1991. The *Roe* ruling invalidated state laws that prohibited abortion.<sup>151</sup> States that had such laws began to implement new laws that aimed to place barriers on women's rights to abortion. These barriers were a part of the backlash to *Roe* and ranged from requiring spousal consent (or parental consent in the case of minors), twenty-four hour waiting periods before abortions, prohibiting the use of state or federal funds to administer abortions, and requiring abortions to be performed in hospitals, to name a few.<sup>152</sup> Between 1974 and 1992, the Supreme Court ruled on more than twenty cases involving state or federal government actions that impeded the right to abortion, like the ones listed above.

Organizations like the National Organization for Women ("NOW") and Planned Parenthood saw these laws, rules, and regulations that limited a women's right to an abortion as an attack on women and their bodies. Some of them filed claims in courts across the nation. One such case is *Planned Parenthood v. Casey*.<sup>153</sup> The case revolved around a Pennsylvania law that attempted to regulate or control women's right to abortion.<sup>154</sup> Pennsylvania's law prohibited abortions up until *Roe* held that such laws were

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<sup>148</sup> See Neil A. Lewis, *The Thomas Hearings: Thomas Undergoes Tough Questioning on Past Remarks*, N.Y. TIMES (Sept. 12, 1991), <http://www.nytimes.com/1991/09/12/us/the-thomas-hearings-thomas-undergoes-tough-questioning-on-past-remarks.html> [<http://perma.cc/U4VJ-MZT7>].

<sup>149</sup> *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, Committee on the Judiciary United States Senate, 102nd Cong. 297 (1993).

<sup>150</sup> *Id.* at 53.

<sup>151</sup> *Roe v. Wade*, 410 U.S. 113, 164 (1973).

<sup>152</sup> See *Overview of Supreme Court Decisions on Abortion and the Right to Privacy*, CTR. FOR REPROD. RTS. (May 7, 2009), <http://www.reproductiverights.org/document/overview-of-supreme-court-decisions-on-abortion-and-the-right-to-privacy> [<http://perma.cc/7D5R-8QGN>].

<sup>153</sup> 744 F. Supp. 1323 (E.D. Pa. 1990).

<sup>154</sup> *Id.* at 1326.

unconstitutional. Shortly after *Roe*, Pennsylvania, like other states, attempted to implement laws to control, or some would argue restrict, abortion in the 1980s. One such law was the Pennsylvania Abortion Control Act of 1982.<sup>155</sup>

The Act required doctors to give specific information to the patient regarding the abortion procedure, implemented a twenty-four hour waiting period after she received the information before she could have the abortion procedure, required parental or judicial consent for minors before they could obtain an abortion, required women to inform their husbands of the procedure except in limited circumstances, and mandated that second trimester abortions be performed in a hospital.<sup>156</sup> The case eventually made its way back to the Supreme Court.

NOW wanted to ensure women's voices were going to be heard. On April 6, 1992, NOW sponsored the March for Women's Lives in support of abortion rights.<sup>157</sup> The march occurred mere weeks before the Supreme Court was scheduled to hear arguments in *Casey*.<sup>158</sup> Depending on who you ask, approximately half a million to 750,000 people attended the march.<sup>159</sup> NOW estimated attendance at approximately 750,000, while the police estimated attendance to be 500,000.<sup>160</sup> *Casey* eventually made its way back to the Supreme Court. The Supreme Court was scheduled to hear arguments on April 22, 1992.<sup>161</sup> Either way, the march was one of the most attended marches on Washington at that time, and was attended by celebrities like Jane Fonda and Democratic presidential candidates of the 1992 presidential election like Bill Clinton.<sup>162</sup>

*The New York Times* quoted the President of NOW, Patricia Ireland, stating, "The reality is that we're tired of begging men in power for our rights. . . . If the courts won't protect them, then Congress has got to enact laws to protect a woman's rights. And if Congress doesn't, then we're going to elect pro-choice women to Congress."<sup>163</sup> This was arguably a rallying cry for women to

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<sup>155</sup> *Id.* at 1327.

<sup>156</sup> *See id.*

<sup>157</sup> *See* Ronald J. Ostrow & Marilyn Yaquinto, *Pro-Choice Rally Draws 500,000*, L.A. TIMES (Apr. 6, 1992, 12:00 AM), <http://www.latimes.com/archives/la-xpm-1992-04-06-mn-422-story.html> [<http://perma.cc/Bj5E-VAHW>].

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Karen de Witt, *Huge Crowd Backs Right to Abortion in Capital March*, N.Y. TIMES (Apr. 6, 1992), [http://link.gale.com/apps/doc/A174836830/ITOF?u=dclib\\_main&sid=ITOF&xid=5b14a443](http://link.gale.com/apps/doc/A174836830/ITOF?u=dclib_main&sid=ITOF&xid=5b14a443) [<http://perma.cc/X6TD-2L3C>].

<sup>161</sup> *See* Ostrow & Yaquinto, *supra* note 157.

<sup>162</sup> Witt, *supra* note 160.

<sup>163</sup> *Id.*

organize, nominate, and elect women to protect their rights. Women heeded the call.

After the march, the Supreme Court issued their decision in *Casey* in July 1992. The Court reaffirmed *Roe* and prohibited states from placing an “undue burden” on a woman’s right to an abortion.<sup>164</sup> The case was a victory for women, especially supporters of the Women’s March, as it relates to its reaffirming *Roe*—which some feared was in danger of being overruled. An even greater victory was to come—the presidential election of 1992.

The presidential election of 1992 was a victory for women for several reasons. First, women increased their presence in both the House and the Senate of Congress. In 1991, two women held Senate seats: Nancy Kassebaum of Kansas and Barbara Mikulski of Maryland.<sup>165</sup> This changed drastically as a result of the 1992 presidential election. According to the Center for American Women and Politics, thirteen women ran for Senate seats.<sup>166</sup> Prior to that time, the most women candidates for Senate at one time was ten in the 1984 presidential election.<sup>167</sup> Four women were elected to Senate seats, joining the two women incumbents. The Senate went from two women Senators to six women Senators overnight. The Senate was not the only branch of Congress making historical, unprecedented gains.

The House had even more gains for women. One hundred six women ran for House seats in the 1992 presidential election.<sup>168</sup> This marked a historical moment for the House. Up to that point, no more than sixty-nine women had ran at one time, which happened to be in the previous election in 1990.<sup>169</sup> Twenty-four women were elected to serve their first term in the House of Representatives in 1992.<sup>170</sup> That year, Carol Moseley-Braun was the first woman of color ever elected to the Senate.<sup>171</sup>

Perhaps women were incited by the confirmation hearings, or maybe they were motivated by the rallying of the Women’s March; either way the presidential election of 1992 was a

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<sup>164</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992).

<sup>165</sup> See Wendy Kaminer, *Crashing the Locker Room*, ATLANTIC (July 1992), <http://www.theatlantic.com/magazine/archive/1992/07/crashing-the-locker-room/376351/> [<http://perma.cc/2HCP-YMXZ>].

<sup>166</sup> *Summary of Women Candidates for Selected Offices*, CTR. FOR AM. WOMEN & POLITICS (Nov. 7, 2019), <http://www.cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf> [<http://perma.cc/BC7M-XRD3>].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *The Year of the Woman, 1992*, *supra* note 138.

<sup>171</sup> *Id.* at n.47.



victorious one for women. The victories did not end at election day. Congress passed key legislation that directly impacted the lives of women, such as: (1) the Family Medical Leave Act, (2) the Violence Against Women's Act, and (3) the Freedom of Access to Clinic Entrances Act, which made it a crime to block entrances of reproductive health clinics or to commit an act of violence against a clinic.

One political party benefited greatly from the Year of the Women: the Democratic Party. According to the Roper Center for Public Opinion Research, forty-five percent of women voters voted for Democrat President Bill Clinton, while thirty-eight percent voted for Republican President George H.W. Bush.<sup>172</sup> This trend of women leaning towards the Democratic Party started in 1992 and continued all the way up to the presidential election of 2016. Between 1992 and 2016, more than fifty percent of women voted for the Democrat presidential candidate.<sup>173</sup> Men tended to vote for Republican candidates during that time, with the exception of President Barack Obama's presidential election in 2008. Women were finally mobilizing as a bloc voting for the Democratic Party.

### C. The 2018 Presidential Election

If 1992 was the Year of the Woman, what shall we call 2018? In 2018, a record-breaking number of women were elected to office throughout the nation. In the Senate, a record-breaking twenty-four women were elected to serve in the 116th Congress.<sup>174</sup> The largest gains for women in Congress were seen in the House of Representatives. In the House of Representatives, thirty-six women were elected to office for the first time, only one of which was Republican.<sup>175</sup> This surpassed the record set in 1992 of twenty-four women. The total number of women in the 116th House was 102, which shattered the record set in 2016 of eighty-five women.<sup>176</sup> The 116th House was comprised of forty-three women of color and a diverse group of first timers, which included the first Native American women

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<sup>172</sup> *How Groups Voted in 1992*, ROPER CTR. FOR PUB. OPINION RES., <http://ropercenter.cornell.edu/how-groups-voted-1992> [<http://perma.cc/4ETM-UG5H>] (last visited Nov. 28, 2019).

<sup>173</sup> See Richa Chaturvedi, *A closer look at the gender gap in presidential voting*, PEW RES. CTR. (July 28, 2016), <http://www.pewresearch.org/fact-tank/2016/07/28/a-closer-look-at-the-gender-gap-in-presidential-voting/> [<http://perma.cc/87VK-N2XU>].

<sup>174</sup> *Press Release: Results: Women Candidates in the 2018 Elections*, CTR. FOR AM. WOMEN & POLITICS (Nov. 29, 2018), [http://cawp.rutgers.edu/sites/default/files/resources/results\\_release\\_5bletterhead5d\\_1.pdf](http://cawp.rutgers.edu/sites/default/files/resources/results_release_5bletterhead5d_1.pdf) [<http://perma.cc/TTF9-KJ65>].

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

elected to Congress, the first Muslim women elected to Congress, the first bisexual woman elected to Congress, and the youngest woman ever elected to Congress.<sup>177</sup>

In total, 126 women served in the 116th Congress in 2018.<sup>178</sup> One hundred six of the 126 are Democrats, making the congressional race not just about women, but about Democratic women.<sup>179</sup> The gains went beyond Congress. More women than ever ran for Governor of their state. According to the National Women's Law Center, sixteen women won their primary in the race for Governor.<sup>180</sup> Stacey Abrams, Georgia's Democratic candidate for Governor was the first Black female major-party nominee for Governor.<sup>181</sup> She lost her race to the incumbent, Governor Brian Kemp, in a widely publicized race that some argued was plagued with voter suppression tactics.<sup>182</sup> Nine women went on to win their gubernatorial race, three of which became the first female Governor of their state.<sup>183</sup> Fifty-eight women were elected to executive offices throughout the nation, many of which were the first woman of color to serve in the position for their state.<sup>184</sup> Thousands of women ran for office in their state's legislature, setting a record.<sup>185</sup> Women made huge gains in the political sphere, and more specifically, Democratic women made huge gains.

The number of Democrat women serving in state legislators in 2018 was more than double the number of Republican women in 2017.<sup>186</sup> Both locally and nationally, women made significant gains in the political sphere in 2018.

<sup>177</sup> Li Zhou, *A historic new Congress will be sworn in today*, VOX (Jan. 3, 2019, 11:15 AM), <http://www.vox.com/2018/12/6/18119733/congress-diversity-women-election-good-news> [<http://perma.cc/H4YF-83CT>].

<sup>178</sup> See Bethany Blankley, *A record of 'firsts' among 126 women elected to 116th Congress*, CTR. SQUARE (Dec. 29, 2018), [http://www.thecentersquare.com/national/a-record-of-firsts-among-women-elected-to-th-congress/article\\_f5f3e64c-0796-11e9-acf7-7fe57d73128b.html](http://www.thecentersquare.com/national/a-record-of-firsts-among-women-elected-to-th-congress/article_f5f3e64c-0796-11e9-acf7-7fe57d73128b.html) [<http://perma.cc/D8GS-NP9Q>].

<sup>179</sup> *Press Release: Results: Women Candidates in the 2018 Elections*, *supra* note 174.

<sup>180</sup> Candace Milner, *2018 Was a Historic Year for Women in Politics*, NAT'L WOMEN'S L. CTR. (Nov. 7, 2018), <http://nwlc.org/blog/2018-was-a-historic-year-for-women-in-politics/> [<http://perma.cc/SAT4-C77Q>].

<sup>181</sup> See David Marchese, *Why Stacey Abrams is still saying she won.*, N.Y. TIMES (Apr. 28, 2019), <http://www.nytimes.com/interactive/2019/04/28/magazine/stacey-abrams-election-georgia.html?mtrref=www.google.com&gwh=249E833535DA17B030A32F798FEB3A9A&gwt=pay&assetType=REGIWALL> [<http://perma.cc/PH3M-3G5S>].

<sup>182</sup> *See id.*

<sup>183</sup> *Press Release: Results: Women Candidates in the 2018 Elections*, *supra* note 174.

<sup>184</sup> *Id.*

<sup>185</sup> Milner, *supra* note 180.

<sup>186</sup> *Women Serving in the 50 States 2017*, NCSL (Nov. 7, 2017), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2017.aspx> [<http://perma.cc/PPD3-UW9M>].

When thinking about what led to the gains in 2018, we can look back to 1992 and watch history repeat itself. We can compare fears that the Republican presidential candidate would appoint conservative Justices to the Supreme Court to overturn *Roe*, to the fears that President Trump would appoint a conservative Justice to the Supreme Court to fill its vacant seat. We can compare the sexual harassment allegations against Supreme Court Justice Clarence Thomas to presidential candidate Donald Trump's comments about grabbing women by their pussies and the #MeToo Movement.<sup>187</sup> We can compare the 1992 March for Women's Lives to the 2017 March on Washington and around the United States. We can compare the regulations aimed at limiting reproductive freedom leading up to the 1992 election to the regulations limiting reproductive freedom leading up to the 2018 election. According to the Guttmacher Institute, states enacted sixty-three new restrictions on abortion access in the year leading up to that election, the largest number enacted in one year since 2013.<sup>188</sup>

The 1992 election and 2018 election demonstrate that when women's rights are attacked or at risk of attack, they rally. And when they rally, they vote and elect. Women have proven to be a strong voting force, not just in 1992 and 2018, but in the elections in between. More specifically, Democratic women have proven to be a strong voting force as they have showed up to the polls consistently, as demonstrated above. Even more specific, Black women were emerging as a strong voting force.

### 1. Black Women at the Polls

Black women had a late start to the polls, but caught up quickly. Though the Nineteenth Amendment gave women the right to vote in 1920, many Black women were unable to exercise their right to vote until the VRA of 1965.<sup>189</sup> In 1964, fifty-eight percent of Black women cast votes.<sup>190</sup> By 2012, the number of Black women who voted in the election jumped to seventy percent.<sup>191</sup> Black women showed up at the polls more than any

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<sup>187</sup> Transcript: *Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <http://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> [http://perma.cc/K9MU-v427].

<sup>188</sup> Elizabeth Nash et al., *Policy Trends in the States, 2017*, GUTTMACHER INST. (Jan. 2, 2018), <http://www.guttmacher.org/article/2018/01/policy-trends-states-2017> [http://perma.cc/GQC5-RQEP].

<sup>189</sup> Emily Baxter, Kaitlin Holmes & Rob Griffin, *The Importance of Women of Color Voters: Then and Now*, CTR. FOR AM. PROGRESS (Aug. 26, 2015, 9:05 AM), <http://www.americanprogress.org/issues/women/news/2015/08/26/120074/the-importance-of-women-of-color-voters-then-and-now/> [http://perma.cc/QK5R-99UP].

<sup>190</sup> *Id.*

<sup>191</sup> *Gender Differences in Voter Turnout*, *supra* note 131.

other group that year. Sixty-five percent of eligible white women voted, sixty-two percent of eligible white men voted, and sixty-one percent of eligible Black men voted.<sup>192</sup>

Black women continued to out-vote men in the 2018 midterm elections. Fifty-five percent of eligible Black women voted<sup>193</sup> and ninety-two percent of them voted Democratic.<sup>194</sup> In comparison, white women split their votes between Democrats and Republicans.<sup>195</sup> It is clear to see that Black women are a market to be catered towards, especially in the Democratic party. As Aimee Allison, Founder and President of She the People stated, “If you enter into a campaign and you don’t already have established relationships with black women in particular, you are not going to be successful.”<sup>196</sup>

Women, especially Black women, have proven to be a strong voting bloc at the polls. History has proven that when women show up at the polls, they vote for Democratic candidates. As mentioned above, women have been out-voting men for decades and Black women have been steadily increasing their presence at the polls at almost every presidential election since the late 1980s.<sup>197</sup> So, what happens when democratic women become a strong voting bloc at the polls? They become targets. Some would say if you cannot beat them, join them by catering to them. Others would say if you cannot beat them, suppress them—more specifically, suppress their vote.

#### D. Voter Suppression

Voter suppression tactics are not new. After the Fifteenth Amendment gave men of color the right to vote in 1869, several tactics to suppress their votes were employed. Tactics included literacy tests, constitution or citizenship tests, poll taxes, and moral character requirements.<sup>198</sup> Though some whites were impacted by the tactics, these measures were aimed at

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<sup>192</sup> *Id.*

<sup>193</sup> See Jordan Misra, *Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014*, CENSUS (Apr. 23, 2019), <http://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html> [<http://perma.cc/RP6C-HCUC>].

<sup>194</sup> Alec Tyson, *The 2018 midterm vote: Divisions by race, gender, education*, PEW RES. CTR. (Nov. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/11/08/the-2018-midterm-vote-divisions-by-race-gender-education/> [<http://perma.cc/2M7L-9RC2>].

<sup>195</sup> See *id.*

<sup>196</sup> Melanie Eversley, *Black Women Voters Will Be Central to the 2020 Presidential Election, Experts Predict*, FORTUNE (June 20, 2019), <http://fortune.com/2019/06/20/black-women-voters-2020-election/> [<http://perma.cc/5YWD-WLB3>].

<sup>197</sup> See *Gender Differences in Voter Turnout*, *supra* note 131.

<sup>198</sup> See H.R. REP. NO. 89-439, at 2443, 2451–53 (1965).

disenfranchising the newly enfranchised Black men.<sup>199</sup> When women gained the right to vote in 1920, these tactics were still at play. The only difference was that Black women became targets along with Black men. These voter suppression tactics remained in practice up until 1965 when the VRA prohibited them, with the exception of the poll tax. The poll tax was found to be unconstitutional in 1966 by the U.S. Supreme Court in *Harper v. Virginia Board of Elections*.<sup>200</sup>

Voter suppression did not end with the passing of the VRA. Although the old tactics of tests and taxes were prohibited, new tactics began to emerge and are in practice today. These new tactics are in the form of voter ID laws, elimination of early voting, misinformation, and intimidation. Voter suppression is a reproductive justice issue. Voting is one of the tools women can use to fight for reproductive justice. When the right to vote is attacked, women are limited in their ability to fight for reproductive justice. In 2019, six states, all with Republican controlled state legislators, put forth “early abortion bans” to restrict abortions that occur between six and eight weeks after the first day of the pregnant woman’s last period.<sup>201</sup> Those states include Georgia, Kentucky, Louisiana, Mississippi, Missouri, and Ohio.<sup>202</sup> Alabama put forth a law that banned abortion at any point unless the mother’s health is at risk.<sup>203</sup> These laws all directly contradict *Roe*, which permits abortions up until viability, when the fetus can live on its own outside of the uterus.<sup>204</sup> While these states were busy passing abortion bans, they were also implementing new voting restrictions like those named above. This section addresses how those tactics impact all women and Black women in particular, and how they are utilized in states implementing the strictest abortion bans.

Four of the seven states implementing abortion bans do not allow early voting.<sup>205</sup> While the other three states (Georgia, Louisiana, and Ohio) allow early voting, they attempted to limit early voting in 2012 by either reducing the days or hours of early

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<sup>199</sup> See *id.* at 2443–44.

<sup>200</sup> See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

<sup>201</sup> See Mara Gordon & Alyson Hurt, *Early Abortion Bans: Which States Have Passed Them?*, NPR (June 5, 2019, 3:08 PM), <http://www.npr.org/sections/health-shots/2019/06/05/729753903/early-abortion-bans-which-states-have-passed-them> [<http://perma.cc/XCE4-XVQN>].

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

<sup>204</sup> See *Roe v. Wade*, 401 U.S. 113, 154 (1973).

<sup>205</sup> Missouri, Kentucky, Mississippi, and Alabama do not allow early voting. See Ankita Rao, Erum Salam & Juweek Adolphe, *Which US states make it hardest to vote?*, GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2019/nov/07/which-us-states-hardest-vote-suppression-election> [<http://perma.cc/5YC9-3E25>] (last updated Dec. 5, 2019, 12:43 PM).

voting, or eliminating Sunday voting.<sup>206</sup> Given that most states permit early voting, those states that do not are in the minority.<sup>207</sup>

Florida provides anecdotal evidence of what happens when early voting is limited. According to NOW, limits to early voting during the 2012 presidential election caused long lines at the polls with some voters waiting until 2:30 a.m. to cast a vote.<sup>208</sup> Early voting is useful for not only eliminating long lines on election day, but also allowing voting when it is convenient. This is helpful for women who are often caretakers for their family. Additionally, it prevents women from missing work, which could result in a loss of pay or unfavorable judgement from co-workers.

#### E. Voter ID Laws

Voter ID laws are another tactic used to suppress voters. Voter ID laws are fairly new—the first law was passed in 2006.<sup>209</sup> Today, eighteen states require photo identification to vote.<sup>210</sup> Three of the seven states implementing abortion bans in 2019 require a photo identification to vote.<sup>211</sup> Former Attorney General, Eric Holder, summed up the problem with voter ID laws in a speech he made before the NAACP in 2012. Holder stated, “Many of those without IDs would have to travel great distances to get them, and some would struggle to pay for the documents they might need to obtain them. We call those poll taxes.”<sup>212</sup> Voter ID laws impact women more than men since women often change their name when they marry. NOW estimates that ninety percent of women have a different name on their photo ID than birth certificate due to name changes after marriage.<sup>213</sup> In some states, those women would need to take extra steps to verify their identity before they vote. This presents an added and unnecessary barrier to vote.

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<sup>206</sup> See Emily Stewart, *The battle over early voting, explained*, VOX, <http://www.vox.com/2018/10/29/18018634/early-voting-2018> [<http://perma.cc/8DZK-KWQ2>] (last updated Nov. 4, 2018, 9:07 AM).

<sup>207</sup> Thirty-eight states permit early voting, while five states do not, and seven states require an excuse to vote early. See Rao, Salam & Adolphe, *supra* note 205.

<sup>208</sup> See *Voter Suppression Targets Women, Youth and Communities of Color (Issue Advisory, Part One)*, NOW (Aug. 2014), <http://now.org/resource/voter-suppression-targets-women-youth-and-communities-of-color-issue-advisory-part-one/> [<http://perma.cc/8DBK-V2GQ>].

<sup>209</sup> See *id.*

<sup>210</sup> See Rao, Salam & Adolphe, *supra* note 205.

<sup>211</sup> Alabama, Georgia, and Mississippi require photo identification to vote. See *id.*

<sup>212</sup> JOHN H. JORDAN, BLACK AMERICANS 17TH CENTURY TO 21ST CENTURY: BLACK STRUGGLES AND SUCCESSES 544 (2013).

<sup>213</sup> See *Voter Suppression Targets Women, Youth and Communities of Color (Issue Advisory, Part One)*, *supra* note 208.

## F. Voter Misinformation

Voter misinformation is rampant, not just on election day, but year-round. It is perpetrated by heads of states, including ours, political leaders, network news organizations, and anonymous internet users. President Trump alleged that millions voted illegally and put together a commission to look into voter fraud.<sup>214</sup> There was no evidence to support the allegation, and the commission was later dissolved.<sup>215</sup> These claims of voter fraud, which have been repeatedly debunked, lead to these laws which attempt to restrict voting.

Of course, there is also the issue of Russian interference into the election by posting false information on social media sites, aimed at discouraging people of color from voting. Social media has become an increasingly popular tool to spread misinformation on voting, candidates, and the issues on the ballot, especially abortion. Researchers at the University of Wisconsin-Madison reported finding hundreds of Facebook and Twitter posts with inaccurate information regarding where and when to vote.<sup>216</sup> Additionally, Facebook is known to be plagued with misleading content on controversial topics like abortion.

Misinformation is obviously dangerous when it involves where and when a person should vote. It is also dangerous when the misinformation revolves around political issues like abortion. This danger is amplified when social media is involved. Social media has the ability to reach large amounts of people very quickly. Voters presented with false information are robbed of their ability to make an informed decision at the polls. As social media use grows, advocates will need to do a great deal of work to protect voters from misleading information on social media.

The above tactics are just a few of the voter suppression tools that are used. If one needs additional anecdotal evidence of their use, look no further than the state of Alabama, which is currently attempting to ban all abortions, with the exception of those needed when there is a medical risk.<sup>217</sup> Alabama has a history of voter suppression. The state has been accused of a host of voter

<sup>214</sup> See *Disbanded: Trump's "Voter Fraud" Commission*, BRENNAN CTR. (May 11, 2017), <http://www.brennancenter.org/our-work/research-reports/disbanded-trumps-voter-fraud-commission> [http://perma.cc/H95E-R2SV].

<sup>215</sup> See *id.*

<sup>216</sup> See Young Mie Kim, *Voter Suppression Has Gone Digital*, BRENNAN CTR. (Nov. 20, 2018), <http://www.brennancenter.org/our-work/analysis-opinion/voter-suppression-has-gone-digital> [http://perma.cc/N762-MY4B].

<sup>217</sup> See Erin Durkin, Jessica Glenza & Amanda Holpuch, *Alabama abortion ban: Republican state senate passes most restrictive law in US*, GUARDIAN (May 15, 2019, 2:22 PM), <http://www.theguardian.com/us-news/2019/may/14/abortion-bill-alabama-passes-ban-six-weeks-us-no-exemptions-vote-latest> [http://perma.cc/LJZ2-WU2B].

suppression tactics such as purging rolls, closing polls, and gerrymandering.<sup>218</sup> In fact, under the VRA of 1965, Alabama was one of nine states which required approval or “pre-clearance” from the federal government before it could implement any change to voting procedures.<sup>219</sup> This changed in 2013 after the Supreme Court invalidated the pre-clearance provision in the case of *Shelby County v. Holder*.<sup>220</sup>

In 2014, for the first time, Alabama required a photo ID to vote.<sup>221</sup> To further complicate matters, Alabama intended to close more than thirty-one ID-issuing offices.<sup>222</sup> The plan would close ID offices in all six counties where Blacks made up more than seventy percent of the population, but left open forty offices in counties where whites were in the majority.<sup>223</sup> The plan was cancelled due to backlash.<sup>224</sup>

In 2016, Alabama attempted to implement a law requiring proof of citizenship before registering to vote.<sup>225</sup> Furthermore, Alabama does not permit early voting<sup>226</sup> and is also one of eight states where the women’s prison population grew while the men’s prison population declined.<sup>227</sup> While incarcerated voters are eligible to vote if they have not been convicted of a felony involving moral turpitude, the women’s prison population is another indication that women’s liberties are at risk in the state of Alabama.

Alabama’s use of voter ID laws, voter registration laws, and lack of early voting earned it a spot towards the top of the Guardian’s list of the hardest states in which to vote.<sup>228</sup> In fact, five of the seven states that implemented some form of an early abortion ban made the Guardian’s list of the hardest places to vote.<sup>229</sup> Alabama is not alone in its use of voter suppression tactics. Many other states are using these tactics. Women, in

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218 See Peter Dunphy, *When It Comes to Voter Suppression, Don’t Forget About Alabama*, BRENNAN CTR. (Nov. 5, 2018), <http://www.brennancenter.org/our-work/analysis-opinion/when-it-comes-voter-suppression-dont-forget-about-alabama> [http://perma.cc/XX8H-S82J].

219 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

220 *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

221 See ALA. CODE § 17-9-30 (2019).

222 See Dunphy, *supra* note 218.

223 See *id.*

224 See *id.*

225 See *New Voting Restrictions in America*, BRENNAN CTR. 1, 2 (July 3, 2019), <http://www.brennancenter.org/sites/default/files/legal-work/New%20Voting%20Restrictions.pdf> [http://perma.cc/WE8G-54VZ].

226 See Rao, Salam & Adolphe, *supra* note 205.

227 See Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, PRISON POL’Y INITIATIVE (Jan. 9, 2018), [http://www.prisonpolicy.org/reports/women\\_overtime.html](http://www.prisonpolicy.org/reports/women_overtime.html) [http://perma.cc/SN7N-HFBB].

228 See Rao, Salam & Adolphe, *supra* note 205.

229 See *id.*



particular, must pay close attention to these tactics and their use in conjunction with restrictions being implemented on reproductive rights.

#### IV. CONCLUSION: WHAT'S NEXT FOR REPRODUCTIVE JUSTICE AND VOTER SUPPRESSION?

*“America achieves a measure of reproductive justice in Roe v. Wade, but we must never forget, it is immoral to allow politicians to harm women and families to advance a political agenda.”*<sup>230</sup>

Voting rights are at the center of the reproductive justice movement, especially due to the ongoing and increased federal and state government attacks on reproductive rights, coupled with voter suppression efforts. Moreover, “[i]t has become clear that the courts won’t protect us anymore. We must protect ourselves and our best weapon is our vote,” writes Barbara Ann Luttrell, vice president of external affairs at Planned Parenthood Southeast.<sup>231</sup> Acknowledging continued distrust of courts, modern movement lawyering calls for a variety of strategies outside of traditional litigation and case law.<sup>232</sup>

Stacey Abrams’ gubernatorial campaign is a case study of reproductive justice lawyering outside of traditional case law and litigation. Abrams, a lawyer and former House Minority Leader for the Georgia General Assembly, said her “campaign was a love song to SisterSong”; moreover, she described her campaign as one that “center[ed] communities of color and [spoke] to the marginalized and disadvantaged”—indeed, recognizable language to any reproductive justice advocate.<sup>233</sup> Thus, although Abrams’ campaign was thwarted—arguably to some and not arguable to others—by voter suppression, it will remain a victorious example of what reproductive justice lawyering could look like. Given the historic nature of Abrams’ campaign, Abrams was in the media

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<sup>230</sup> Stacey Abrams, former Georgia gubernatorial candidate, Democratic response to State of the Union (Feb. 5, 2019), in *Dem response to the State of the Union*, POLITICO (Feb. 8, 2019, 9:35 AM), <http://www.politico.com/interactives/2019/stacey-abrams-state-of-the-union-2019-response-fact-check-transcript-2/5/19/> [<http://perma.cc/DV3Q-FTFL>]. Stacey Abrams continued to make history by being the first Black woman to give the Democratic response to President Donald Trump’s second State of the Union address.

<sup>231</sup> Barbara Ann Luttrell, *My Body, My Voice: The courts won’t protect us anymore*, CREATIVE LOAFING (Nov. 4, 2019), <http://creativeloafing.com/content-464715-MY-BODY-MY-VOICE-The-courts-won-t-protect-us-anymore> [<http://perma.cc/NCK9-J9FF>].

<sup>232</sup> See Cummings, *supra* note 31, at 165.

<sup>233</sup> Abigail Abrams, ‘We Are Grabbing Our Own Microphones’: How Advocates of Reproductive Justice Stepped Into the Spotlight, TIME (Nov. 21, 2019), <http://time.com/5735432/reproductive-justice-groups/> [<http://perma.cc/X4TJ-SYJQ>]; see also *Georgia House Biography of Rep. Stacey Abrams*, <http://www.house.ga.gov/Documents/Biographies/abramsStacey.pdf> [<http://perma.cc/MCZ8-6DPH>] (last visited Nov. 29, 2019).

spotlight and, while in the spotlight, she chose to center the most attention on the marginalized and what the reproductive justice framework calls for. Moreover, her campaign repeatedly and explicitly centered around the reproductive justice movement and a reproductive justice organization.<sup>234</sup>

Following Abrams' loss, Brian Kemp became Georgia's new Governor and House Bill 481, also known as the Living Infants Fairness and Equality (LIFE) Act, was signed into law in 2019.<sup>235</sup> Often referred to simply as HB 481 or Georgia's abortion ban, HB 481 criminalizes abortion once a doctor detects a fetal heartbeat and treats fetuses as natural persons.<sup>236</sup> Echoing the reproductive control of women of color, especially Black women as slaves, one opponent of HB 481 called it a "forced birthing bill," because it essentially criminalizes all abortions, since the majority of people who can get pregnant may not have knowledge of the pregnancy in time to seek a legal abortion under the ban.<sup>237</sup>

SisterSong, along with other plaintiffs, filed a lawsuit challenging the constitutionality of HB 481. Hailed as "part lawsuit, part feminist manifesto," *SisterSong v. Kemp* embodies elements of movement lawyering despite being a traditional legal strategy.<sup>238</sup> Indeed, it is no mistake that SisterSong, a Georgia-based nonprofit and membership organization, is the lead plaintiff amongst eleven, including healthcare providers and individual doctors.<sup>239</sup> Most challenges to the constitutionality of state abortion bans have been taken on by healthcare providers.<sup>240</sup> Yet, SisterSong, unlike its co-plaintiffs, does not

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<sup>234</sup> Abigail Abrams, 'We Are Grabbing Our Own Microphones': How Advocates of Reproductive Justice Stepped Into the Spotlight, *TIME* (Nov. 21, 2019), <http://time.com/5735432/reproductive-justice-groups/> [<http://perma.cc/X4TJ-SYJQ>]; see also *Georgia House Biography of Rep. Stacey Abrams*, <http://www.house.ga.gov/Documents/Biographies/abramsStacey.pdf> [<http://perma.cc/MCZ8-6DPH>] (last visited Nov. 29, 2019).

<sup>235</sup> See H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019); see also *Georgia 'Living Infants Fairness and Equality (LIFE) Act' (HB 481)*, *REWIRE*, <http://rewire.news/legislative-tracker/law/georgia-living-infants-fairness-and-equality-life-act-hb-481/> [<http://perma.cc/FJ93-2DML>] (last updated May 7, 2019).

<sup>236</sup> See *Georgia 'Living Infants Fairness and Equality (LIFE) Act' (HB 481)*, *supra* note 235.

<sup>237</sup> See Renitta Shannon (@RenittaShannon), *TWITTER* (Mar. 26, 2019, 9:04 AM), <http://twitter.com/renittashannon/status/1110573250252288000> [<http://perma.cc/GHV6-EBLQ>].

<sup>238</sup> Jim Galloway, *SisterSong v. Brian Kemp is part lawsuit, part feminist manifesto*, *AJC* (June 28, 2019), <http://www.ajc.com/blog/politics/sistersong-brian-kemp-part-lawsuit-part-feminist-manifesto/xlOgSYL1KjxOyJeH3uhRkM/#> [<http://perma.cc/Z3Y3-V423>].

<sup>239</sup> See Complaint at 6, *SisterSong v. Kemp*, No. 1:19-cv-02973-SCJ, 2019 U.S. Dist. LEXIS 194134 (N.D. Ga. 2019) (argued Sept. 23, 2019), ECF No. 1.

<sup>240</sup> See Julianne Escobedo Shepherd, 'We're Not Playing Games': *SisterSong's Monica Simpson On a New Legal Challenge to Georgia's Abortion Ban*, *JEZEBEL* (July 1, 2019, 4:30 PM), <http://theslot.jezebel.com/were-not-playing-games-sistersongs-monica-simpson-on-a-1835999731> [<http://perma.cc/3TQB-K7XH>].

provide healthcare; nonetheless, the federal court reasoned SisterSong has standing to sue given the “organization’s purpose of protecting ‘the human right to reproductive justice.’”<sup>241</sup> Describing the collaboration between SisterSong and the ACLU lawyers to frame the lawsuit, Monica Simpson says, “We were really able to lean on the ACLU a lot, and I think they really leaned on us about language . . . .”<sup>242</sup> For example, the complaint includes a footnote about the use of “woman” and “women” throughout the document and pointedly acknowledges people outside of the gender binary who can become pregnant.<sup>243</sup> Moreover, while “[a] lot of abortion lawsuits erase women of color,” *SisterSong* focuses on women of color by detailing how Georgia’s abortion ban will specifically exacerbate issues affecting women of color, including Black maternal mortality.<sup>244</sup> The ACLU’s collaboration with SisterSong enabled the lawyers to create a unique lawsuit and a powerful, stand-alone example of reproductive justice lawyering.

What’s next? A federal judge granted a preliminary injunction for *SisterSong* and opponents to abortion hope the ban eventually gets reviewed by the Supreme Court as a challenge to *Roe*.<sup>245</sup> Although a direct challenge is not likely, even if it does occur, the Supreme Court may weaken *Roe* with another case that has progressed further up the pipeline.<sup>246</sup> Regardless, when it comes to reproductive rights, voting rights do matter. *SisterSong* would not exist had there been no voter suppression leading to Governor Brian Kemp’s election in Georgia. Similarly, the continued dismantling, and now possible overturning of *Roe*, would not be possible if President Donald Trump had lost the U.S. presidential election in 2016.

Put differently, “elections matter” and Part III demonstrated that women and other marginalized groups are not only major voting blocs, but also the primary target of voter suppression.<sup>247</sup>

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<sup>241</sup> Court Order Granting Preliminary Injunction at 23, *SisterSong v. Kemp*, No. 1:19-cv-02973-SCJ, 2019 U.S. Dist. LEXIS 194134 (N.D. Ga. 2019) (argued Sept. 23, 2019), ECF No. 97.

<sup>242</sup> Shepherd, *supra* note 240.

<sup>243</sup> Complaint at 4, *SisterSong v. Kemp*, *supra* note 239.

<sup>244</sup> Abrams, *supra* note 233.

<sup>245</sup> *SisterSong v. Kemp*, ACLU (June 28, 2019), <http://www.aclu.org/cases/sistersong-v-kemp> [<http://perma.cc/J7LT-DY8X>].

<sup>246</sup> While writing this Article, the Supreme Court announced an early 2020 hearing date for *June Medical Services, LLC v. Gee*. This case requires Louisiana doctors to have admitting privileges within thirty miles of a facility where they are providing abortion care. See *June Medical Services, LLC v. Gee*, CTR. FOR REPROD. RTS., <http://reproductiverights.org/june-medical-services-llc-v-gee> [<http://perma.cc/QWV4-PS7U>] (last visited Nov. 29, 2019). If this law goes into effect, and is not struck down by the Supreme Court, then Louisiana’s citizens are at risk of losing access to abortion care. See *id.* In addition, more states may be encouraged to pass abortion laws that render abortion inaccessible.

<sup>247</sup> Luttrell, *supra* note 231.

Part II proved protecting reproductive rights is about more than abortion. Indeed, abortion is not the only right that can be banned if women's voting rights—especially women of color—continue to be attacked and suppressed. Therefore, voting rights and fighting to secure those rights, especially for the most marginalized, is, and always was, a reproductive justice issue. When Stacey Abrams—already a case study for reproductive justice lawyering—announced Fair Fight 2020, a nationwide based voter protection campaign aimed at increasing voter registration and turnout, she made clear what she is prioritizing: justice.<sup>248</sup>

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<sup>248</sup> Oliver Laughland, *'I'm not convinced we will have fair elections in America': Stacey Abrams' fight against voter suppression*, GUARDIAN (Nov. 7, 2019, 6:01 PM), <http://www.theguardian.com/us-news/2019/nov/07/stacey-abrams-georgia-suppression-voting-rights-campaign-democracy> [<http://perma.cc/B2LW-RH75>].